SUPREME COURT, U. S.
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No. 73-616

In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL A. S. MAKRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The principal issue presented is whether the failure to afford a pretrial competency hearing pursuant to 18 U.S.C. 4244 can be cured by a post-trial hearing to determine past competency.

After a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts of perjury at a Securities and Exchange Commission inquiry, in violation of 18 U.S.C. 1621. He was given consecutive sentences of four years' imprisonment on the first two counts and five years' probation on the third. Prior to trial, the court on the government's motion appointed a psychiatrist to examine petitioner and report on competency.[1]

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[1]Eight months prior to his appearance before the Securities and Exchange Commission, and two years prior to trial, petitioner

The court interpreted the psychiatrist's report as failing to indicate present incompetency within the meaning of 18 U.S.C. 4244, and on that basis ruled that a hearing was unnecessary. The psychiatrist then testified in support of petitioner's insanity defense, which the court by its conviction also rejected. The court of appeals held that the pretrial report as a whole indicated a sufficient possibility of inability on the part of petitioner properly to assist in his own defense to have made a Section 4244 hearing mandatory (Pet. App. 30-31). It did not, however, order a new trial, but instead remanded for a *nunc pro tunc* hearing to determine petitioner's competency at the time he was tried, provided that the trial court first determine that an adequate and meaningful *nunc pro tunc* hearing was possible (Pet. App. 32-33). The court of appeals also reversed petitioner's conviction on one count for insufficiency of the evidence, but left it open to the government to retry him on that count (Pet. App. 20).

1. Petitioner notes that the Ninth Circuit has held that a failure to afford an adequate pretrial competency hearing when one was required can be cured only by a hearing to determine present competency and a new trial if such competency is found (see cases cited at Pet. 6);[2] he urges resolution of the conflict between that holding and the decision of the court below (Pet. 8). We acknowledge the conflict but suggest that it is

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underwent brain surgery which entailed extensive manipulation of the frontal lobes of the brain as well as destruction of the pituitary gland.

[2]The same rule is followed in the District of Columbia Circuit. See *Holloway* v. *United States*, 343 F. 2d 265.

not of sufficient importance to require resolution by this Court. While it is true that in *Dusky* v. *United States,* 362 U.S. 402, and in *Pate* v. *Robinson,* 383 U.S. 375, this Court required new trials after hearings on present competency,[3] both decisions were based upon the facts of the particular cases. See 362 U.S. at 403; 383 U.S. at 387. The court of appeals in this case was well aware of both *Dusky* and *Pate,* but it felt that "an adequate hearing at this time is greatly enhanced by the fact that the trial court will have the benefit of testimony from the court-appointed physician who examined [petitioner] shortly before trial as well as its own personal observation of [petitioner] during trial" (Pet. App. 32).

Moreover, a *nunc pro tunc* hearing was conditioned upon a district court determination that an adequate and meaningful one was possible. Petitioner's complaint is therefore premature. The district court may conclude on remand that a *nunc pro tunc* determination of competency is not now possible, or, upon now considering the issue, it may decide that petitioner was not competent. This Court should not now consider the relatively abstract question whether a *nunc pro tunc* competency hearing can ever be granted, but should wait to see whether one is in fact granted. At that time a record will have been made upon which the court of appeals and this Court can base a decision.

2. Petitioner's other arguments are without merit. His contentions that the convictions on the unreversed

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[3]Both the Ninth and the District of Columbia Circuits placed considerable reliance, in evolving their rule, upon the decision in *Dusky.* Cf. *Meador* v. *United States,* 332 F. 2d 935, 939, n. 9 (C.A. 9); *Holloway* v. *United States,* 343 F. 2d 265, 267 (C.A. D.C.).

counts were based upon answers taken out of context (Pet. 9-10) and that as a matter of law he should have been acquitted on grounds of insanity (Pet. 11-12) were fully considered and properly rejected by the court of appeals (see Pet. App. 20-24 as to the first contention and 25-29 as to the second), on whose opinion we rely. His objection to the possibility of retrial on the reversed count (Pet. 8) is based on the speculative assertion that a competency hearing preceding retrial of that count will necessarily be held contemporaneously with the *nunc pro tunc* hearing; there is no reason to believe that such a procedure is contemplated.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.